PAYMENT OF CLAIM OF ARNOLD ESTATE BY THE UNITED STATES NOT A GRATUITY.

As this suit is based upon a private contract providing for payment to defendant in error of a certain compensation upon collection of the Arnold claim against the United States; as that claim has been collected, and as the plaintiff in error now has in its hands the balance of that agreed compensation, it would not seem that the nature of the claim which was prosecuted should be deemed material to decision of the case. However, we know that in other cases arising under the same enactment, inquiry has been made by the courts on this point, and for that reason we here discuss the question of the general character of the Civil War claims covered by the appropriation act of March 4, 1915.

We will show that these claims are *not gratuities* in any sense of that term; but that, on the contrary, they are *claims* against the Government for that *"just compensation"* guaranteed by the Fifth Amendment for the taking of private property for public use.

The first and natural object of consideration under this head is the Act making the appropriation in question, in order to ascertain the view which Congress itself took of the nature of the appropriations therein made.

The enacting clause (38 Stats., 962) reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to claimants in this Act named the several sums appropriated herein, the same being in full for and the receipt of the same to be taken and accepted in each case as a full and final release and discharge of their respective claims, except that claimants under this Act receiving compensa-

> tion for use and occupancy of property shall not be barred from further prosecution of claims arising from damages or destruction of the same property, namely:

It will be noted that the receipt by the claimants is to be taken and accepted "as a full and final *release* and *discharge* of their respective *claims.*"

How could there be a *"release"* of a mere gratuity or of a petition for the granting of a gratuity? How could there be a *"discharge"* of a petition for a gratuity? The terms *"release"* and *"discharge"* are obviously wholly inconsistent with any idea of a *gratuity;* they have proper and natural reference to a *claim or demand,* based upon some *consideration.*

It is also to be noted that, as to claims for use and occupation of real estate, mentioned in the concluding portion of the above-quoted enacting clause, it is expressly stated that claimants under this Act receiving *"compensation"* for *use* and *occupancy* shall not be barred from later prosecuting a claim arising from damage to or destruction of the same property.

In other words, Congress, in the very enacting clause of this Act, declared that the sums appropriated were by way of *compensation* for property either taken and used, or occupied.

It is to be further noted, as a material fact, that in Sec. 3 of this same Act, Congress provides:

> "That in case of the death of any claimant, or the death or discharge of the executor or administrator of any claimant herein named, payment of such claims shall be made to the legal representatives: *Provided,* That where a claimant is dead the administrator or executor, or legal representative shall file a certified copy of his bond, which bond must be at least equal in amount to the sum hereby appropriated. * * *"

It would seem plain that, if the money appropriated is to be paid over to an administrator or executor, under his bond,

then the money necessarily becomes *assets of the estate,* subject to distribution after payment of all legal claims or debts due from the estate. This further fact negatives any theory that the money is paid as a *gratuity.*

In short, it is very apparent, right on the face of the appropriation act itself, that this money is being paid as *"compensation"* for property taken and used, belonging to claimants or to their decedents.

In reaching a conclusion as to the intent of Congress in passing any act, it is proper to refer to the reports made on the bill pending before enactment. We refer now to House Report No. 97, 63d Congress, 2d Session, on this Claims Bill.

On page 15, under the heading "Ordinary Individual Claims for Stores and Supplies," the Committee on War Claims of the House of Representatives said:

> Claims of this class are shown by the petitions forming a part of the statements of each case as certified by the Court of Claims to usually embrace such items as horses, mules, cattle, hogs, corn, meat, fodder, fencing used and considered as cordwood, and, in some instances, use and occupation of real estate at regular military posts, sometimes for considerable periods.
>
> In this class of cases, covered by this bill, the Court of Claims has found the persons from whom the property was taken in each case to have been continuously loyal throughout the Civil War, and that the property was taken by proper authority, for use of the army, or, in claims for rent, that the reasonable rental value of the premises occupied during the period of occupancy, with the damages incident to the occupation, amounts to a certain sum.

The committee report on the bill merely confirms the only reasonable conclusion to be drawn from the act itself, and that is, that these appropriations are made as *"compensation"*

for property which was taken and used, under proper authority, for governmental purposes.

In this same connection, and as forming a supplemental report on this same bill, by Senator N. P. Bryan, of Florida, chairman of the Committee on Claims, it may be pertinent to quote his statement of the contents and purport of the bill, taken from the Congressional Record of March 3, 1915, p. 5922, as follows:

Mr. Bryan * * *

> *I make the further statement that, if there is an idea that there are included within the covers of this bill claims which have no foundations, or if it is supposed that any item is in the nature of a gift or gratuity to the proposed beneficiaries, the idea is without foundation in fact. The bill represents compensation for property that was taken from these people by the Government in time of war and under the necessities of war, but property for the taking of which they had a right to believe they would be recompensed; property the payment for which the good faith of the Government of the United States was pledged by its officers when the property was taken and used for the support of the army.*

The propriety of referring to the statement of Senator Bryan, explanatory of the purpose of the bill then pending in the Senate, is shown by similar references to the Congressional Record by this court in cases of Atlantic Coast Line R. Co. vs. Riverside Mills, 219 U. S. 186-200-201, and of U. S. vs. St. Paul, M. & M. R. Co., 247 U. S. 310-316-317.

A further statutory recognition of just such claims as those covered by the Claims Appropriation Act of March 4, 1915, as constituting something wholly different from mere gratuities, is to be found in the acts by which Congress appropriated for payment of claims allowed by the Southern Claims Commission, which Commission is described in the "History of Civil War Claims," in the early portion of this brief.

The Act of March 3, 1875, 18 Stats., Part 3, p. 637, is taken as a sample. The enacting clause of that act is as follows (emphasis ours):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he is hereby, authorized and required to pay, out of any moneys in the Treasury not otherwise appropriated, to the several persons in this act named, the several sums mentioned therein, *the same being in full for, and the receipt of the same to be taken and accepted in each case as a full and final discharge of, the several claims presented by such persons to the commissioners of claims* under the Act of March third, eighteen hundred and seventy-one, and reported to the House of Representatives under the said act, that is to say:

There, as as in the enacting clause of the Act of March 4, 1915, we find it provided that the money appropriated shall be taken as constituting a full and final discharge of the claims presented.

As above suggested, there can be no such thing as a "full and final discharge" of a *gratuity.*

It will be noted that, while dealing with a Civil War Claim, prosecuted before that Commission, in the Taylor-Bemiss case (110 U. S., 42), the court speaks of claimants as being *"creditors."* If the *claimant* is a *creditor,* it follows that *his claim is not a gratuity,* but is a claim, either legal or equitable.

On page 7 of the record in this case are quoted the "Conclusions" of the Court of Claims on the Arnold claim, reading as follows:

"CONCLUSIONS."

> "Upon the foregoing findings of fact the court concludes that the claim herein is an equitable one in the sense that the United States received the benefit of the supplies and the use of the property for which claim is made."

It is submitted that this is conclusive of the nature and character of the claim, being the decision of a special tribunal, expressly charged by Congress (Act June 25, 1910, 36 Stat., 837) with the duty of reporting the proven facts

> "together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim , legal or equitable, or as a gratuity, against the United States."

It will be noted that *"claims"* are divided by that act of Congress into two classes (1) legal, and (2) equitable. If a demand does not fall within the definition of one of those two classes, then it must be a gratuity. The converse is also true. If the demand *is* a *claim, either* legal or equitable, *then it is not a gratuity.*

That conclusion of the Court of Claims is in effect a legal decision, and being the decision of a special tribunal, from the decision of which, in cases referred to it by Congress, there is no appeal to any other tribunal, is final and conclusive.

The fact that the Court of Claims stated its conclusion in the Arnold case, "that the claim herein is an equitable one," and followed that "conclusion" with the explanatory words "in the sense that the United States received the benefit of the supplies and the use of the property for which claim is made," does not detract from the legal effect of the *conclusion.* The words last quoted merely set forth the reasons for the conclusion, and make it plain, also, that the sum named in the findings of fact represented the value of private property taken from the claimant, for public use, for which, under the Fifth Amendment, he was entitled to just compensation.

Assuredly, where an appropriation is made by Congress equal in amount to the judicially ascertained value of private property taken for public use, and when that appropriation is susceptible of identification with the findings and conclusion in a particular case tried by the Court of Claims (as is possible

here, by referring to House Report No. 97, 63d Congress, 2d Session, pages 64-65), it is beyond any controversy that the sum appropriated is paid by the Government as the *"just compensation"* required by the Fifth Amendment, and possesses none of the attributes of a mere donation, gratuity or bounty.

See, also, on this point, the statement of the Supreme Court of Tennessee, in Moyers vs. City of Memphis (135 Tenn. 263):

> We do not agree with learned counsel for defendant, that the claim appropriated for and paid to the city, in this case, was a bounty or a gift; it was in the nature of a debt, and was supported by a good and valuable consideration. It is true that its payment could not be enforced by legal process, and was dependent upon the voluntary action of Congress. But the finding of the Court of Claims, which is attached to the agreement of facts, as Exhibit 3, shows that the claim was based upon "the reasonable rental value of the premises" in question from January 1, 1863, to April 1, 1866, which were taken and occupied by the military authorities of the Federal Government during the Civil War.

In case of Williams vs. Heard, 140 U. S., 529, the court was called upon to decide whether a claim for a part of the fund paid by Great Britain to the United States as a result of the Geneva Award (Alabama Claims) was a mere gratuity, or a property right, passing to an assignee in bankruptcy.

The court stated, in effect, that payment must await the action of Congress, and that no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund; and that Congress was under no absolute obligation to distribute the fund at all; but the court also said:

> There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the

Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress—an expectancy of interest in the fund, that, is a possibility coupled with an interest.

* * * * * *

There was thus at all times a possibility that the Government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the Act of Congress for the distribution of the fund. But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the Act of Congress did was to provide a remedy for the enforcement of the right.

The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened; they are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets, or might have been devised by will; while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personalty.

It is well recognized as a rule of jurisprudence, that the inadequate nature of a *remedy* for the enforcement of a right, or even the utter absence of remedy for that enforcement, does not alter the character of the right or demand itself.

In case of Grant vs. U. S., 1 Ct. Cl., 41-43-47, a suit was brought during the Civil War by a citizen, to recover compensation for property destroyed by proper military authority, to prevent its falling into the hands of Confederate forces, and a judgment was given for the claimant.

The following statements were there made by the court, in dealing with the general subject of the legal and constitutional obligation of the Government to compensate its citizens

for private property taken for governmental purpose, whether for actual use or merely for destruction:

> Every civilized State recognizes its obligation to make compensation for private property taken under pressure of State necessity, and for the public good. The State is the transcendental proprietary of all the property, real and personal, of its citizens or subjects. This transcendental right—the *eminent domain* of the State in all countries where rights are regulated by law—is so exercised as to work no wrong, to inflict no private injury, without giving the party aggrieved ample redress. This doctrine was not engrafted on the public law to give license to despotic and arbitrary sovereigns. It has its foundation in the organization of societies and States, and is as essential to a republic as to the most absolute despotism. It is of the very essence of sovereignty, and without it a State could not perform its first and highest duty, its own preservation. Vital as is this high prerogative of States, it must be exercised in subordination to the clear principles of justice and right. Whenever, from necessity or policy, a State appropriates to public use the private property of an individual, it is *obliged*, by a law as imperative as that in virtue of which it makes the appropriation, to give to the party aggrieved redress commensurate with the injury he has sustained. Upon any other principle the social compact would work mischief and wrong. The State would have the right to impoverish the citizen it was established to protect; to trample on those rights of property, security for which was one of the great objects of its creation.
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> * * * * * *
>
> The letter and spirit of the public, and of the constitutional provision in this regard, require just compensation to be made in every case when private property is *rightfully* taken for public use, whether it be by legislative authority or under the powers necessarily exercised by those commanding our land and naval forces in time of war or imminent public danger. * * * The fundamental law provides that private property shall not be taken for public use without just compensation. * * *

> The obligation to make compensation is coextensive with the right of the State to take private property for public use; and whenever it is taken by competent authority, the obligation of the State can not be evaded.

In that case a judgment was rendered claimant for $41,530. No appeal was taken by the United States, and the judgment became final.

It is to be borne in mind, also, that under the law as it existed when the judgment was entered in the Grant case, the Court of Claims' jurisdiction was confined strictly to the trial of *legal* claims. It had no equity jurisdiction of any kind. Hence, the entry of judgment in the Grant case, and the becoming final of that judgment, is *conclusive* that a Civil War claim was a *legal claim.*

Other claimants would doubtless have fared equally as well had it not been for the later enactment of July 4, 1864 (13 Stats., 381), which prohibited the Court of Claims from exercising any further jurisdiction of claims arising from the operations incident to the Civil War.

That act merely took away the *remedy* previously existing, however; it did not, and could not, change the fact that *the claims of this nature were valid demands against the Government, under the provisions of the Constitution.*

In the case of Mitchell vs. Harmony, 13 How., 115, Justice Taney, in delivering the opinion of the court, said, page 134:

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner."

In the case of United States vs. Russell, 13 Wall., 623-629, Justice Clifford, in delivering the opinion of the court, said:

> "Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppressions and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the Government to deprive the owner of his property without his consent."

After referring to the conditions or emergencies for taking private property for the public service in times of war, etc., the court at the bottom of page 629 says:

> "Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the Government must make full restitution for the sacrifice."

In the case of Erwin vs. United States (97 U. S., 392), it was held that a claim for the proceeds of cotton taken under the Captured and Abandoned Property Act passed to the assignee in bankruptcy. In its opinion in that case the court said:

> "When the appellant filed his petition in bankruptcy his claim against the Government was property, though

of uncertain value. It was a claim for the proceeds of goods which once belonged to him, and of the possession of which he has been deprived by the action of the Government. *Whether this was done rightfully or wrongfully does not affect the character of the claim as property,* though it may affect the validity and value. *Claims for compensation, for the possession, use or appropriation of tangible property, constitute personal estate equally with the property out of which they grow, although the validity of such claims may be denied, and their value may depend upon the uncertainties of litigation, or the doubtful result of an appeal to the Legislature.* A demand of a bankrupt, which is outlawed, must go to the assignee; for contingencies may arise in many ways which will give value to it. *Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the Legislature."*

See, also, to similar effect, Phelps vs. McDonald, 99 U. S., 298.

In case of Emerson vs. Hall, 13 Peters, 409-413, the court held that where *services* were *volunteered* to the Government, no obligation on the part of the Government was thereby created, thus following the general rule often applied as between individuals, and the court said:

A claim having no foundation in law, but depending entirely on the generosity of the Government, constitutes no basis for the action of any legal principle. It can not be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the Government from motives of public policy, or any other considerations, shall think proper, under the circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation,

it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the Government.

Compare the statements above quoted, to the effect that a mere donation or gratuity does *not* go to an administrator, as assets, with the numerous items of appropriation in the War Claims Act, *in express favor of administrators and executors,* and it is very apparent that Congress assuredly did *not* regard these war claims as falling within the definition of a donation or gratuity as described in Emerson vs. Hall.

Further, and as bearing directly on the fact that Congress might have declined to pay these claims, as it did fail to pay them during a period of years, and as showing that such mere power to decline to make an appropriation does not affect the nature or character of the claims themselves, we call attention to the following case:

In Carr vs. State, 127 Ind., 204; 26 N. E., 778; 11 L. R. A., 370, the court said:

> "It can not be true that a State is bound by a contract and yet be true that it has power to cast off its obligation and break its faith, since that would involve the manifest contradiction that a State is bound and yet not bound by its obligation. It may have the might and means of defeating the enforcement of a contract, yet in a just sense, have no power to do so. Might and opportunity do not constitute power in the true sense; to constitute power another element must be present, and that element is right. If right is absent there is no power.
>
> * * * * * * *
>
> The Legislature has, therefore, the ability to avoid payment of the obligation of the State by a failure or refusal to make the necessary appropriation, although that body can not impair the obligation of the contract."

The mere fact that Congress might, at its discretion, refuse to pay any of these Civil War claims reported by the Court

of Claims, is wholly immaterial in determining the character of the claims, as Congress has and may exercise the right to *decline* to make an appropriation for payment of any kind of a debt owed by the United States.

Section 9, Article I, of the Constitution, provides that—

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law. * * *

Hence it follows that Congress, by refusal to act, may prevent payment of an absolute judgment, against the Government. By refusal to make an appropriation, Congress might cause the Government to default in payment of interest on United States bonds, or in payment of the principal of said bonds, when due. There is no limit to the power of Congress to prevent payment, by mere refusal to make an appropriation. No writ of mandamus will lie to *compel* Congress to act or to perform *any* duty, no matter how plain that duty may be. An unconstitutional act of Congress may be declared void by the courts, but there is no remedy afforded for the mere *inaction* of Congress, upon any matter.

The mere fact that Congress may refuse to pay *any* obligation of the Government is wholly immaterial in determining the nature of the demand.

The cases above cited surely show that what are commonly called Civil War claims are constitutional demands for "just compensation" for private property taken for public use, and hence they are *not gratuities*.

CASES DISTINGUISHED.

It has been observed, that in practically all the cases which have been briefed on this statute, counsel representing claimants desirous of avoiding compliance with their fee contracts have cited some or all of the cases hereinafter treated.

LEGAL TENDER CASES.

A careful study of the majority opinion in the Legal Tender Cases (Knox vs. Lee, and Parker vs. Davis), 12 Wall., 457, shows that the decision sustaining the Legal Tender Acts, making U. S. Treasury notes a legal tender in payment of debts between individuals, was based primarily on the grounds:

1. That Congress had been given express constitutional power to regulate coinage, and to borrow money, and as a necessary incident to borrowing money, might emit bills of credit, *i. e.*, Treasury notes or bonds.
2. That, in the exercise of any express or necessarily implied power of Congress, that body may choose the means of carrying out such power, and if the *means* chosen do *tend to carry out* the constitutional object of Congress, then such *means* must be held constitutional.
3. That the Legal Tender Acts did *not* impair the obligation of contracts, and therefore did *not* deprive men of their property without due process of law, *because* it must be held that when two persons enter into a contract calling in general terms for payment of a certain sum of money, at a future date, they do so with knowledge of the power of Congress over the subject of coinage, etc., and must be held to agree that the payment provided may be made with whatsoever happens to be legal money at date of payment, even though the gold or silver currency itself may be lighter in the amount of metal contained, or of a less degree of fineness than that in use when the contract is made.

It is to be further noted that the court, in the majority opinion, made it manifest that it considered as of great, if not controlling weight, what were deemed the exigencies of the occasion for the enactment of the acts there in question, and regarded them practically as necessary to the very preservation of the nation.

Again, attention is called to the following statement by the court, in that opinion:

> We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. *Undoubtedly not.* But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values.

In the case at bar defendant in error does not assert that, between the date of his contract with his client, and the date of payment of the Arnold claim, Congress might not have changed the weight or fineness of metal coins, or might not have taken such action with relation to legal tender as to have operated, indirectly, to diminish the *value* of his expected and agreed compensation; but the Legal Tender Cases do not sustain in any manner the validity of the enactment here involved, which was enacted for the obvious and express purpose of abrogating in certain particular, enumerated transactions or cases, the contracts between private individuals, not by changing the *means* of payment, but by providing, in effect, that a promise to deliver or pay a certain liquidated number of dollars, should be satisfied by tender or payment of a certain *less number* of dollars.

In connection with the above-quoted statement that Congress could not have provided that a contract to deliver a certain quantity of grain should be satisfied by delivery or tender of a less amount, the court further said:

It can not, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts.

Yet the act here in question expressly states that fee contracts between counsel and clients shall be satisfied by not more than a certain payment, *"any contract to the contrary notwithstanding."*

This legislation can not be deemed one of the many kinds, falling within the legislative power of Congress, which *indirectly* and *incidentally* impairs the obligation of contracts; this particular act *in terms does so,* with all possible directness. The court, as above seen, in the Legal Tender Cases, said that could *not* be done.

In the later case of Trebilcock vs. Wilson, 12 Wall., 687, the contract involved called for payment of a certain sum of money *"in specie,"* and this court held that said act could not operate to alter the terms of that contract, and that there must be enforced a strict compliance with the terms of the contract, the payment to be made *"in specie."*

It is thus seen that, when the court had squarely presented a case wherein application of the Legal Tender Acts *would* impair the obligation of a contract, it was held that the acts were *inapplicable,* and that, too, *notwithstanding* the express terms of the first act (Feb. 25, 1862, 12 Stats., 345), providing that the Treasury notes to be issued under that act (emphasis ours):

> shall be receivable in payment of all taxes, * * *, and shall also be lawful money and *a legal tender in payment of all debts,* public and private, within the United States, except duties on imports and interest as aforesaid.

In that case the earlier case of Bronson vs. Rodes, 7 Wall., 229, was cited. This earlier case held that a contract to pay

"in gold and silver coin, lawful money of the United States," must be satisfied in *coin*, and not in legal tender notes, the court saying:

> *It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties.*

In some other cases involving this same fee limitation statute it has been urged by those attempting to sustain its validity that Congress has express power to pay the *debts* of the United States; that Congress has power to choose any means of accomplishing that end; that this appropriation act for payment of these claims allowed by the Court of Claims was enacted pursuant to that power, and hence the appropriation might be accompanied by any desired condition.

It is true that the last paragraph of Art. I, Sec. 8, of the Constitution confers upon Congress the authority to make all laws necessary and proper to execute the other powers of Congress. It is also true that Congress has a wide discretion in its choice of means of carrying its powers into execution, and the means chosen need not be an indispensable means; but the means chosen must be one which itself is not in contravention of any Constitutional provision .

As stated in McCulloch vs. Maryland, 4 Wheat., 316-421, and quoted in First. Bank vs. Fellows, 244 U. S., 416-420 (emphasis ours):

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the Constitution,* are constitutional.

In the case at bar, however, Congress has seen fit merely to tack to an appropriation a distinct and separate enactment

designed and in terms expressly stated to be designed, to strike down existing rights, acquired for a valuable consideration, under valid private contracts. This added section of the appropriation act can not be deemed a *means* of paying the debts of the United States.

Further, it does *not* "consist with the letter and spirit of the Constitution."

We do not here question the power of Congress to pay the debts of the United States, and to choose "necessary and proper" means for so doing. *What we question is the right of Congress to add as a rider to an appropriation for payment of national debts, a provision to prevent a citizen from paying his private debts, otherwise than by uniform bankruptcy laws.*

As a means of paying the debt due the Arnold estate, Congress might have provided that payment be made only in Treasury notes, and not in currency, and even though it might so happen that such notes were at a discount, Calhoun could not object. Or, it might have been enacted that payment be made only in certain kinds of bonds, even though they were selling for less than par on the open market.

It does not follow, however, that Congress may attach arbitrary conditions to the payment of the debt, *which conditions do not comprise a means of effecting the payment.*

To illustrate, Congress could not have attached a condition that no part of the money appropriated, when received by the claimant, should be used for payment of any pre-existing indebtedness. It could not have provided that no part of the sum appropriated should be used in payment for articles of attire, or that the claimant should not use any part of the sum paid in the purchase of a residence. Nor could it have provided that a creditor accepting payment of a pre-existing debt, from the fund appropriated, should be guilty of a misdemeanor for so doing.

In short, the mere physical inclusion of an invalid provision in a statute enacted pursuant to constitutional power does not give validity to that which is inherently invalid.

As stated in Wilson vs. New, 243 U. S., 332-345:

> The doing of one thing which is authorized cannot be made the source of an authority to do another thing which there is no power to do.

As soon, as least, as the Treasurer pays over money appropriated in payment of one of these debts of the government, that money becomes just as absolutely the property of the claimant as though he had acquired it in ordinary business. It becomes liable for payment of *his* debts, and may be used by the claimant precisely like any other money owned by him.

SINKING FUND CASES.

As in other cases which have been argued, involving the point here presented, those seeking to sustain the constitutionality of the enactment involved have relied on the "Sinking Fund Cases," Union Pacific Railroad Co. vs. U. S., 99 U. S., 700, and Central Pacific Railroad Co. vs. Gallatin, 99 U. S., 727, we will refer to those cases.

These Sinking Fund Cases presented the question of whether Congress might require the railroad companies to establish a sinking fund for redemption of their bonds, whereon the Government was liable, the Government having loaned its credit to the companies.

The majority of the court sustained the enactment requiring the establishment of this sinking fund, on the ground that Congress had *retained the right to alter or amend the charter or act* of Congress whereunder each company acquired its rights from the federal government, and held that the

reserved right to *amend or alter* the charters of the companies carried with it a right to regulate the business of the companies in any reasonable manner, and therefore did *not* deprive the companies of their property without due process of law.

As exemplifying the legal principles which the court had in mind in deciding the sinking fund cases, we quote the following from the opinion in U. P. R. R. Co. vs. U. S., 99 U. S., 700, the first case decided (emphasis ours):

> The *United States can not*, any more than a State, *interfere with private rights*, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, *but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law.* * * *

With respect to the reserved power of Congress to amend the company's charter, the court said:

> That this power has a limit, no one can doubt. All agree that it can not be used to take away property already acquired under the operation of its charter, * * *.
>
> Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the Corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing *it can not undo what has already been done, and it can not unmake contracts that have already been made, but it may provide for what shall be done in the future*, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or might have said that no bonded debt

> should be created without ample provision by sinking fund to meet it at maturity. *Not having done so at first, it can not now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred.* An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, *will not invalidate a bond already out. All such legislation will be confined in its operation to the future.*

In the second case, of C. P. R. R. Co. vs. Gallatin, 99 U. S., 727, in stating again the ground for the court's opinion, it is said:

> All complaint thus far has come from the Corporation itself, which, to secure the government aid, accepted all the conditions that were attached to the grants, including the reservation of power to amend.

We are unable to see wherein the sinking fund cases tend in any manner to sustain the contention of plaintiff in error, that Congress had a right to do exactly what the decisions in the sinking fund cases say *can not* be done, *i. e., "release debts already contracted,"* or *"avoid debts already incurred."*

BUTTFIELD VS. STRANAHAN.

Another case that has been cited elsewhere in dealing with this subject is that of Buttfield vs. Stranahan, 192 U. S., 470; but scrutiny of that decision shows that it merely holds that, under its express and unlimited constitutional power to regulate commerce with foreign nations (an expressly enumerated power), Congress may absolutely prohibit the importation of specified articles of merchandise, the exact language being as follows (emphasis ours):

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States *from consideraions of public policy* does not violate the due process clause of the Constitution.

In that case, again, we have an illustration of a statute restrictive of certain rights, and purely *prospective* in its operation. That act did not provide that certain articles *already imported* should be *exported*. Further, the prohibition there of the importation of an inferior quality of tea was based upon "considerations of *public policy*," while in the cases cited herein this court has held that such contracts as Calhoun made with his client, were in *accord* with *public policy*, and *not* prohibited by that policy.

That case has no apparent relation to or bearing upon the point here involved.

REFUND OF DIRECT TAXES TO STATES.

Wailes vs. Smith, 157 U. S., 271.
Davis vs. Commonwealth, 164 Mass., 241.

By act of March 3, 1891 (26 Stat., 822-823) an appropriation was made for refund to the States of direct taxes collected from them during the Civil War. Those taxes had been constitutionally levied and the refund thereof was purely a matter of *donation* on part of the Government.

It was expressly provided in the appropriation act that the money refunded should be taken in trust, subject to assertion

by individuals who had contributed to the tax originally collected, of their claim on the sum refunded. It was further provided that no money should be paid to any State until its Legislature should, by resolution, have accepted the appropriation with the trusts and conditions annexed. It was further provided that no part of the sums appropriated should be paid to any attorney or agent under any contract for services.

In case of Wailes vs. Smith, 157 U. S., 271, Wailes alleged that he had a contract with Maryland to collect all claims of the State against the Government, and that under said appropriation act Maryland received a certain sum. Wailes sought a mandamus to compel the State Comptroller to draw a warrant for payment of the asserted fee.

The Maryland Court of Appeals (76 Md., 475) decided against Wailes on the grounds:

1. The duty of the Comptroller, being discretionary, could not be controlled by mandamus.
2. No money could be paid out save pursuant to a legislative appropriation, and there was no such appropriation.
3. Payment could not be made out of the particular fund received by the State, as the fund had been accepted subject to the conditions imposed by Congress.
4. The contract between Wailes and the State contemplated prosecution of *claims* of the State, and it had no *claim* for refund of the direct tax, as that tax had been lawfully imposed on the State. Hence, Wailes' contract did not cover his demand.

While there was some discussion of the merits of the case in the opinion of this court, *it was considered on motion to dismiss, on the ground that no federal question was involved, and that motion was allowed, this court saying:*

> The finding of the Maryland court of appeals, that there was no fund in the State treasury upon which the Comptroller could lawfully draw his warrant, because there had been no appropriation made by the State Legislature for the payment of the commissions here claimed, was decisive of the case and involved no federal question.

The quoted paragraph was therefore really the entire judgment of this court in that case.

In case of Davis vs. Commonwealth, 164 Mass., 241, it appeared that Davis had a contract with Massachusetts to act as agent for it and was to receive a certain percentage of the sum received by the State. He sued the State for his compensation in a State court.

The court intimated very pointedly that, after the money had been actually received by the State, it became the absolute owner of the money, with power to do what it pleased with it, there being no actual trust in favor of private persons, as the direct tax had been paid by that State out of general funds, and not by special taxes laid on its people.

The court sustained Davis' contract, so far as it bound the State to pay him a certain sum, but suggested that substantial justice might be done by paying Davis from other funds of the State, thereby avoiding any conflict with the act of Congress, while at the same time satisfying Davis' claim.

The court said:

> If the petitioner has performed his contract with the Commonwealth, and according to the terms of the contract has become entitled to his compensation, we think it would be no defense for the Commonwealth that it had promised the United States that it would not pay him his compensation.

It is to be borne in mind, however, that those appropriations were not made in payment of any judicially ascertained debt

of the United States, forming a constitutional claim for just compensation for property taken for public use. The services rendered by agents or representatives of the States were rendered solely before Congress, in securing a Congressional donation or gratuity, and Congress saw fit to accompany the donation with a certain trust in favor of taxpayers who had contributed to payment by the States of the funds repaid.

If these two cases have any bearing at all on the case at bar, they are assuredly not adverse to any contention we have made.

CAPITAL TRUST COMPANY, ADMINISTRATOR OF ARNOLD, *v.* CALHOUN.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 368. Argued May 2, 1919.—Decided June 2, 1919.

For the prosecution of a claim for taking and use of private property in the Civil War, claimant agreed to pay an attorney's fee of 50% of the amount to be collected, to be a lien on any warrant to be issued in payment of the claim; the bill was referred by the Senate under § 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, now Jud. Code, § 151, to the Court of Claims, where, after evidence and trial, favorable findings were secured, upon which Congress appropriated an amount in payment, but with the restriction that no part thereof in excess of 20% should be paid to or received by any attorney on account of services rendered in connection with the claim, the act further declaring it a misdemeanor for any attorney to exact or receive for such services any sum exceeding that percentage of the amount appropriated, any contract to the contrary notwithstanding.

208. Argument for Defendant in Error.

Assuming the provision for a lien not violative of Rev. Stats., § 3477, and the contract valid when made, *held*, that while the attorney's right to collect his fee from other assets of the client was not affected, the restriction, as to the fund appropriated, was within the power of Congress, and did not deprive him of property or of liberty of contract without due process, although subsequent to the making of the contract and rendition of the services. P. 217.

177 Kentucky, 518, reversed.

THE case is stated in the opinion.

Mr. T. L. Edelen for plaintiff in error.

Mr. Joseph W. Bailey and *Mr. Charles F. Consaul* for defendant in error:

It is maintained by defendant in error that the provisions of § 4, of the Act of March 4, 1915, denying his right to collect from his former client the full compensation due under a valid contract, for his professional services rendered prior to the enactment, and making him liable to punishment for a misdemeanor in event he either compels or accepts compliance with the terms of such valid contract, are in direct derogation of his rights under the Fifth Amendment, in that the statute attempts to deprive defendant in error of his property and liberty without due process of law.

Defendant in error does not contend that, by reason of his services rendered under his contract, he acquired any right of property as against the United States. The property right so acquired is against the Arnold estate. The claim having been investigated and tried in the Court of Claims, and an appropriation having been made by Congress for payment of the sum awarded, and payment having actually been made, the amount appropriated (less the 20 per cent. received,) now in the hands of the administrator of the Arnold estate, is chargeable with payment of the residue of the agreed fee.

This right of property was acquired and held under and by virtue of professional services rendered, in accordance with a valid contract, having express statutory sanction, in no manner opposed to public policy, and was acquired prior to the enactment in question. At least from date of allowance of the claim by the Court of Claims, Calhoun had a chose in action, as against his client, under his valid contract whereunder he had completed his services. That a right of property is thus acquired by counsel has been recognized by the courts. *McGowan* v. *Parish*, 237 U. S. 285.

The instant the act was approved by the President, every individual claimant therein named became the owner of the sum appropriated to him. He could, on refusal by the Treasury officials to pay his claim, secure a mandamus compelling payment. *United States ex rel. Parish* v. *MacVeagh*, 214 U. S. 124; *Osborn* v. *Nicholson*, 13 Wall. 654.

Decisions opposed to our position herein (*Ralston* v. *Dunaway*, 123 Arkansas, 12; *Calhoun* v. *Massie*, 123 Virginia, 673) holding that counsel could acquire by their performance of services under valid contracts, no rights whereof they might not be divested by act of Congress at any time prior to actual payment of the claim, overlook the legal principle that the fee contract constituted a chose in action, and further, that a chose in action is property, regardless of whether or not there exists a present right to sue thereon. It is within the bounds of reason to say that the rights of Calhoun became vested as soon as he accepted the employment and began rendering his services. *Price* v. *Haeberle*, 25 Mo. App. 201.

It is plain that the right becomes a vested property right at least on the securing of a favorable report or allowance of the claim at the hands of the Court of Claims. *Roberts* v. *Consaul*, 24 App. D. C. 551, 559; *Schooner Zilpha*, 40 Ct. Clms. 200.

The uncertainty as to time of payment, or even the possible uncertainty as to whether Congress may appropriate for the entire amount reported, does not affect the character of this vested or property right, although it may affect its extent or value. As the claim itself constituted property, which admittedly goes to the administrator, *Erwin* v. *United States*, 97 U. S. 392, the rights of Calhoun to his compensation must likewise be property, like an estate in contingent remainder, or the interest of an assured under a policy of life insurance.

If Calhoun had died prior to payment of the claim, his property right would have passed as such to his administrator or executor, and could have been enforced. *McGowan* v. *Parish*, *supra*.

Legislation impairing property rights in contracts violates the Fifth Amendment.

In a certain sense it may be said that the statute here involved does not directly impair the liberty of making a contract, but it does in terms operate to deprive defendant in error of his liberty of either enforcing compliance by his client with the terms of a valid contract, or even of accepting from an honest client the agreed compensation in excess of a sum equal to 20% of the sum collected upon a claim.

With reference to what the court said in *Ex parte Garland*, 4 Wall. 333, it may be pertinently asked of what value is the right to appear in court and argue causes for suitors, if, after the attorney has performed these functions of his profession, he can be deprived by act of Congress of the fruits of his labors?

The limitation of attorney fees in pension cases was purely prospective in its operation. The theory of the court in *Frisbie* v. *United States*, 157 U. S. 160, was that, in granting or extending a privilege, Congress may simultaneously lay certain conditions upon persons, either claimants or counsel, availing themselves of such privi-

lege or extension. It by no means follows, however, that Congress may impose such conditions upon counsel, after services have been fully rendered, under valid contracts, and make such conditions practically retroactive in a manner to deprive counsel of their property rights, acquired under their contracts, and enforceable against their clients.

The limitation of counsel fees in Indian depredation claims was sustained, in *Ball* v. *Halsell*, 161 U. S. 72, as being a condition laid by Congress on the right to sue. That act did not, like the one here, seek to enact such limitation after the suit had been conducted to a termination in the Court of Claims.

In the following cases the present fee limitation has been adjudged unconstitutional and void: *Moyers* v. *Memphis*, 135 Tennessee, 263; *Black* v. *O'Hara, Admr.*, 175 Kentucky, 623; *Lay* v. *Lay*, 118 Mississippi, 549; *Newman* v. *Moyers*, 47 App. D. C. 102; *King* v. *Pons, Admr.*, 77 Florida,——. In two cases, it was sustained: *Ralston* v. *Dunaway*, 123 Arkansas, 12; *Calhoun* v. *Massie*, 123 Virginia, 673. Obviously, Congress has the power (as distinguished from the right) to decline to *appropriate* money for any purpose.

Mr. Justice McKenna delivered the opinion of the court.

Proceeding in equity under the law of Kentucky for an accounting from the Capital Trust Company as administrator *de bonis non* of the estate of Thomas N. Arnold, deceased, and that the estate be settled and distributed.

Defendant in error Calhoun and Calhoun & Sizer, a firm composed of C. C. Calhoun and Adrian Sizer, attorneys at law, appeared in the proceeding and by cross-petition prayed judgment against the trust company as such administrator for the sum of $1504.50, with interest from July 10, 1915.

An outline of the facts is as follows: Thomas N. Arnold, prior to his death, believing that he had a just claim against the United States, entered into a contract with the firm of Calhoun & Sizer and employed it to undertake the prosecution of the claim, and on August 1, 1905, entered into a written contract with it by which, in consideration of the services rendered and to be rendered by it in the prosecution of the claim, he agreed to pay it a fee equal in amount to 50% of whatever sum of money should be awarded or collected on the claim, the payment of which was made a lien upon the claim or upon any draft or evidence of payment that might be issued in liquidation thereof.

The firm undertook the prosecution of the claim and bills were introduced in Congress for its payment, and on May 22, 1908, it was referred to the Court of Claims by a resolution of the United States Senate for findings of fact under § 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, now § 151 of the Judicial Code. About that time the firm of Calhoun & Sizer was dissolved and subsequently Arnold died and the beneficiaries of the estate entered into a written contract with defendant in error, C. C. Calhoun, to continue the prosecution of the claim and agreed to pay him 50% of the amount which might be collected, the fee to be a lien "on any warrant" which might "be issued in payment of said claim."

January 15, 1912, the Court of Claims made findings of fact in the matter of the claim and stated the amount thereof as $5015.00. The court's findings were certified to Congress and that body, by an Act approved March 4, 1915, c. 140, 38 Stat. 962, made an appropriation for the payment of the claim and the Secretary of the Treasury was directed to pay it.

The act, however, contained the following provisions:

"That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be

paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1000."

June 7, 1915, Calhoun requested the Secretary of the Treasury to issue a warrant to him for the sum of $1003, which he recited was to be payable to him on account of services as attorney in the claim of the Capital Trust Company against the United States, as appropriated for by the act of Congress, the receipt of said warrant to be taken and accepted as a full and final release and discharge of any claim he had against the United States on account of services in said claim.

Afterward, on July 1, 1915, notice was given to Calhoun, as attorney for the claimant, that in settlement of the claim a check was mailed him for $1003, being 20% of the claim, and to the trust company as administrator *de bonis non* of Arnold, check for $4012. A part of this money is still in the hands of such administrator and there is no other property belonging to the estate.

The cross petition additionally asserts the following: No part of the fee except the sum of $1003 has been paid and there is a balance due of $1504.50, with interest from July, 1915, the date the money was received by the trust company.

July 10, 1915, Calhoun presented his claim to the administrator duly proved and demanded payment, but payment was refused. The whole of the $1504.50, there-

fore, remains unpaid, and Calhoun has a lien upon the fund for the payment, he having accepted the check for $1003 under protest and only on account. The contract preceded the act of Congress and when the act was passed such contracts were lawful and Congress was without authority to take from him his property without due process of law or just compensation therefor or to deprive him of his liberty of contract.

This is repeated and emphasized in various ways and the Fifth Amendment is especially invoked as sustaining it, and for which reasons it is alleged that the "attempted limitation of attorney's fees by said act" was "null and void."

A demurrer to the cross petition was overruled and the trust company answered. A detail of its averments is not necessary. It practically admits those of the cross-petition and pleads in defense the provisions of the act of Congress, and also § 3477, Rev. Stats.

A demurrer was sustained to the answer and judgment rendered for Calhoun for the sum of $1504.50, with interest from July 1, 1915. The judgment was affirmed by the Court of Appeals. The court said: "This case runs on all fours with *Black* v. *O'Hara's Admr.*, 175 Ky. 623, where it was held that the Act of Congress approved March 4, 1915, appropriating money for the payment of similar claims and containing a similar provision limiting an attorney's fee to twenty per cent. of the amount recovered, in so far as it attempted to limit the amount of a fee theretofore earned, was unconstitutional and invalid.

"We have been urged to recede from the rule announced in *Black* v. *O'Hara's Admr.*, *supra*, as being unsound in principle; but after a careful reconsideration of the reasoning by which the decision in that case is supported, we are satisfied of its soundness, and reaffirm it."

We encounter at the outset a question upon the form

of the judgment. The cross-petition was presented in a proceeding to require an accounting of the administrator of Arnold and the petition asserted a claim and lien upon the money in the administrator's hands received from the United States Government. The judgment, however, does not refer to that money or the lien upon it; it provides only that Calhoun recover of the administrator "the sum of fifteen hundred and four 50/100 dollars with interest from July 1st, 1915, and his costs herein and may have execution," etc.

If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States but from other assets of the estate, a situation is presented which it was said in *Nutt* v. *Knut*, 200 U. S. 12, 21, would not encounter legal objection. In other words, the limitation in the act appropriating the money to 20% as the amount to be paid to an agent or attorney would have no application or be involved.

But the judgment is construed by the parties as having more specific operation, construed as subjecting the money received from the Government to the payment of the balance of Calhoun's fee, doubtless because the estate has no other property. On that account it is attacked by the trust company and defended by Calhoun. The controversy thus presented is discussed by counsel in two propositions: (1) The validity of the contract independently of the limitation imposed by Congress upon the appropriated money; (2) the power of Congress to impose the limitation as to that money. The latter we regard as the main and determining proposition; the other may be conceded, certainly so far as fixing the amount of compensation for Calhoun's services (we say Calhoun's services as the appearance of the firm of Calhoun & Sizer was withdrawn), and even so far as the contract provided for a lien, if the distinction made by counsel be tenable—that

is, a distinction between a lien on the claim and a lien "upon any draft, money, or other evidence of payment," to quote from the first agreement, or "on any warrant which may be issued in payment," to quote from the second agreement.

So far as the contract fixed the amount of fee it is within the rule of *Nutt* v. *Knut, supra*, and, for the sake of the argument, the lien may be conceded to be valid against § 3477, Rev. Stats., to the contrary if it be regarded as having been given not upon the claim but upon its evidence, as counsel contend. It may, therefore, not only escape the defect that was held fatal to the lien asserted in *Nutt* v. *Knut*, but may claim the support of *McGowan* v. *Parish*, 237 U. S. 285.

We, however, need not dwell upon the distinctions (their soundness may be disputed) nor upon the contentions based upon them, because, as we have said, we consider the other proposition, that is, the power of Congress over the appropriated money and the limitation of payment out of it to an agent or attorney to 20% of the claim, to be the decisive one.

In its discussion counsel for Calhoun have gone far afield and have invoked many propositions of broad generality—have even adduced as impliedly against the power, if we understand counsel, the constitution of the Court of Claims and its jurisdiction as weight in the same direction.

We can only instance some of the points of the argument. The Act of February 26, 1853, c. 80, 10 Stat. 161, now § 823, Rev. Stats., is cited as recognizing the right of attorneys to compensation for their services in claims against the United States, and it is said that contracts for such compensation have been universally sanctioned as legal. And, further, official statements are adduced to the effect that the Court of Claims is so constituted "that the successful prosecution of a claim" in it "is something more than a merely perfunctory performance on part of